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SUPREME COURT, U.S.

NO. 82-747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHRISTOPHER BOND, LAWRENCE GRAHAM, GEORGE CAMP, EDWARD HAYNES, and DONALD WYRICK,
Petitioners,

v.

CALVIN BURKS, JAMES X. HALL, ROOSEVELT MARTIN, WILLIE NORWOOD, DOUGLAS W. THOMPSON, JAMES E. WILLIAMS and DARRYL HINES, and all other prisoners similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners' Questions Presented do not adequately reflect the circumstances of this case, requiring Respondents' to submit the following:

1. Whether the District Courts under 42 U.S.C. 1988 have discretion to award the prevailing plaintiff an attorney's fee predicated in part on professional services reasonably rendered on factual or legal issues related to the successful claim(s) without regard to whether the plaintiff prevailed also on each of the related factual and/or legal issues.

2. Whether the District Courts have discretion to award the prevailing plaintiff expenses for expert witnesses and other costs of litigation not specifically included as recoverable costs under 28 U.S.C. 1920.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is unfair and improper, requiring Respondents to submit the following alternative statement.

A. Facts Relevant to Attorneys' Fees and Expenses.

The questions of attorneys fees and costs were initially raised by Plaintiffs' Motion for Interim Attorney's Fees and Costs filed with the district court on or about May 1, 1980 with a supporting memorandum and affidavits from each of Respondents' attorneys. Also submitted was a detailed description of all monies expended and debts incurred with an authenticating affidavit based on vouchers, receipts, invoices and other legitimate records. The Petitioners filed their 46 page Suggestions in Opposition to Respondents' Request for Attorneys' Fees on or about July 11, 1980. Respondent filed a written response to Petitioners' "Suggestions" on or about August 13, 1980.

A full evidentiary hearing on attorneys' fees and costs was held before Judge Elmo B. Hunter on February 23 and 24, 1981. Each of Plaintiffs' four attorneys testified and was cross-examined regarding his rates, activities and hours expended in this matter. Respondents presented oral testimony and documentary evidence on expenses.

On July 20, 1981, the District Court issued its Opinion and Order awarding $107,592.93 in attorneys' fees to plaintiffs' four lawyers and $23,646.42 for expenses.[1]

The District Court determined that the plaintiffs prevailed both in and out of the courtroom, through litigation and as a catalyst for change:

> The initial step required in an analysis of [42 U.S.C. 1988] is to determine if plaintiffs are to be considered the prevailing party to this litigation. Defendants in their 46 page brief in opposition to an award of attorney's fees argued strenuously that plaintiffs only prevailed on a portion of the many claims advanced. Hence, defendants argued that this Court should award a fee, if any, based upon a mechanical ratio of those claims in which plaintiffs were successful to those claims adversely to plaintiffs.
>
> This Court was presented with the identical argument, recently in **Eckerhart v. Hensley**, No. 75-CV-87-C, (W.D. Mo., filed Jan. 23, 1981). For the reasons expressed in that opinion, this Court declines to adopt defendants' proportionate success formula. See also, **Planned Parenthood Assoc. v. Ashcroft**, Nos. 80-1130 and 80-1530, (8th Cir., filed July 8, 1981); and **Crain v. Mountain Home**, 611 F.2d 726, 729 n. 7, (8th Cir. 1979). In a case of this magnitude, involving the conditions in an important state institution, this Court refuses to attempt to artificially segregate the issues in this litigation and make isolated assignments of success. It is the opinion of this Court that the entire record in this case compiled over a seven-year period clearly reflects a monumental effort on the part of plaintiffs and a substantial degree of success in improving the conditions at MSP. The impact of the orders affecting overcrowding and medical treatment have had wide-ranging effects on the institution as a whole. Further, it would be incalculable to determine the degree of influence this litigation has had on state officials to bring about necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years. Therefore, this Court considers plaintiffs to have prevailed for purposes of 42 U.S.C. 1988. **Burks, et al. v. Bond, et al., supra**, pp. A-9 and A-10.

Judge Hunter characterized this litigation in the following language:

> The magnitude of this seven-year old litigation cannot be overstated. See, **Burks v. Walsh**, 461 F.Supp. 454 (W.D. Mo. 1978), aff'd. sub. nom **Burks v. Teasdale**, 603 F.2d 59 (8th Cir. 1979) and **Burks v. Teasdale**, 492 F.Supp. (W.D. Mo. 1980). This case involved a substantial constitutional challenge to many conditions of confinement at the Missouri State Penitentiary (MSP) in Jefferson City, Missouri. The two opinions of this Court identified constitutional deficiencies relating to the overcrowding and to the medical treatment of the inmates at MSP. Consistent with the preceding phases of this litigation, the questions relating to attorneys fees and expenses are intensely contested by the parties and have been briefed and argued in elaborate detail. **Burks v. Bond, supra**, pp. A-3 through A-4.

The District Court concluded that Respondents' lead attorney, Michael J. Hoare, expended a total of 1226.78 compensable hours during the period March 1978 through February 1981 and therefore had earned and was entitled to a reasonable attorney's fee of $70,960.50. The District Court concluded that Respondents' attorney Richard

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[1]**Burks v. Bond**, (C.A. Nos. 77-4008-CV-C; 75-100-CV-C; 74-4093-CV-C, W.D. Mo., July 20, 1981). The District Court's Opinion and Order is attached to the Petition For a Writ of Certiorari as Appendix B, pp. A-3 through A-25.

Boardman had expended a total of 528.8 compensable hours during the period commencing May 1975 through February 1981 and had earned and was entitled therefore to a reasonable attorney's fee of $23,854.76. The District Court concluded that Respondents' attorney Steven Gladstone had expended a total of 215.3 compensable hours during the period commencing 1975 through February 1981 and had earned and was entitled therefore to a reasonable attorney's fee of $8,957.63. The District Court concluded that John Lynn had expended a total of 372.8 hours during the period commencing June 1978 through February 1981 and had earned and was entitled therefore to a reasonable fee of $3,820.04.

The District Court specifically concluded that the above fees constituted "reasonable attorneys fees for this action" **Burks v. Bond, supra,** p. A-21.

The District Court's memorandum decision details its analysis using the standards articulated in **Johnson v. Georgia Highway Express,** 408 F.2d 714 (5th Cir. 1974). The District Court considered the time and labor involved, the novelty and difficulty of the question, the skill requisite to perform the legal services properly, the preclusion of other employment due to acceptance of the case, each counsel's customary fee, whether the fee arrangement was fixed or contingent, the time limitations imposed by the client or the circumstances, the amounts of money involved and the results obtained, the experience, reputation, and ability of the attorneys, the undersirability of the case, the nature and length of professional relationships with the clients, and awards in similar cases. Regarding the "amount involved and the results obtained," the court observed:

> This was not a damage action, so there was no monetary relief afforded. But, two injunctions have been issued that have substantially altered conditions at MSP. The overall impact of this litigation upon the lives of the inmate class would be difficult to measure. Nevertheless, the reduction of the overcrowding situation and the improvements in medical care will have a significant positive effect on the lives of the inmates. **Burks v. Bond, supra,** pp. A-19 and A-20.

It is fair to say that the Petitioners contested everything sought by Respondents. The District Court noted that it had been ". . . drawn into the minutia of an exhaustive and tedious dispute between the parties. . . ." **Burks v. Bond, supra,** p. A-10. The District Court, however, entered complete findings with respect to each of the guidelines set out in **Johnson v. Georgia Highway Express, supra.**

The Petitioners have not challenged a single finding as clearly erroneous.

The District Court also awarded Respondents expenses in the amount of $23,646.42.[2] These out-of-pocket expenses are attributable to expert witnesses, depositions, transcripts, attorney expenses, law clerk salaries, telephone charges, copying costs, publications, expedited mail delivery, typing services, photographs and office rental. In determining the expenses appropriate for reimbursement in this litigation, the court considered plaintiffs' Exhibit No. 7 which it concluded "adequately lists all of these expenses." **Burks v. Bond, supra,** p. A-23. In its decision, the trial court considered each of the Petitioners' objections to the expenses and entered appropriate conclusions with respect to each such objection. The defendants have not objected to any determination by the District Court as clearly erroneous.

B. Facts Relevant to the Underlying Litigation Against the Missouri State Penitentiary.

This litigation was initiated in July 1975 under the style **Burks v. Graham**, No. 75-CV-149-C. It was dismissed without prejudice on January 3, 1977 and refiled on January 14, 1977 as **Burks v. Graham**, No. 77-408-CV-C. The Order of January 3, 1977 dismissing Civil Action No. 75-CV-149-C provided, in relevant part, for the costs of the original suit to be included in any final disposition of the re-filed action.

On September 15, 1975 **Burks v. Graham**, No. 75-CV-149-C was consolidated with **Thompson v. Teasdale**, No. 75-CV-100-C. On May 15, 1978 the Court consolidated **Burks v. Graham**, No. 77-4008-CV-C and **Hines v. Teasdale**, No. 78-4093-CV-C.

Burks v. Graham, No. 75-CV-149-C was tentatively certified by the court as a class action on July 11, 1975. The court entered an Order on September 18, 1978 that this matter and the consolidated cases proceed as a class action in the issues of overcrowding, sanitary conditions and medical care.

The original pleadings concerned numerous issues including: (1) overcrowding and sanitary conditions, (2) inadequate medical care, (3) abuse of behavior-modifying drugs, (4) denial of adequate protection of inmates, (5) interference with inmate mail, (6) improper screening of inmates' legal documents, i.e., use of "drop boxes," (7) lack of due process prior to confinement in punitive segregation, and (8) unauthorized practice of medicine by unlicensed and untrained personnel.

Several of these issues were resolved after suit was filed and without the necessity for trial. For example, after suit was filed defendants abandoned their prior practice of requiring inmates seeking the services of a notary public for legal or other

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[2]Contrary to Petitioners' representation no award was made to the American Civil Liberties Union.

documents, to place such documents in a centralized "drop box" labeled "inmate legal papers" for processing by defendants' custodial officers who reportedly reviewed the contents of such documents allegedly in violation of the First and Fourteenth Amendments. Defendants agreed to discontinue the "drop box" procedure, to utilize a civilian employee as a notary public and to notarize documents submitted to this employee without monitoring or screening the contents of the subject document. Also, with defendants agreement to provide medical attention to several of the named plaintiffs, these individual claims were dismissed from the lawsuit. By agreement of counsel, the question of the mail procedures at MSP was struck without prejudice.

After multiple communications between the parties and two conferences with the court, the contested claims were identified as (1) overcrowding, (2) sanitation, (3) medical care, and (4) due process in connection with confinement to punitive segregation.

The claims were bifurcated for separate trials. The overcrowding and sanitation claims were tried on September 25 through September 29, 1978 and concluded on October 5, 1978. **Burks v. Walsh**, 461 F.Supp. 454 (W.D. Mo. 1978). The medical claims were tried during the period February 11 through February 22, 1980. **Burks v. Teasdale**, 492 F.Supp. 650 (W.D.Mo. 1980). The due process claim was not tried because of a determination by Respondents' counsel, without regard to the practice and procedures in effect when this litigation was initiated, that the Petitioners' operation at the time of trial was in apparent compliance with **Wolff v. McDonnell**, 418 U.S. 539 (1974) and its progeny.

(1) Overcrowding

The District Court concluded that although the MSP was overcrowded, as a whole it was not so overcrowded as to be intolerable, inhumane, totally unreasonable, in light of the modern conscience or shocking to the conscience of the court. See, **Burks v. Walsh**, supra, 461 F.Supp. at 487.

The court determined too, however, that double celling of inmates in Housing Units #2, #5 and the Special Treatment Unit and the triple celling in the Adjustment Unit (Punitive Segregation) and the Administrative Segregation Unit and Housing Unit 1 (The Diagnostic Center) each constituted ". . . a living condition which [is] intolerable, inhumane, totally unreasonable in light of the modern conscience, and shocking to the conscience of the court, in violation of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." Id. 461 F.Supp. at 487 et seq.

The court entered these finding after considering:

> The totality of the circumstances which exist at the Missouri State Penitentiary, inlcuding but not limited to, the ability of inmates to move outside their cells during the day and evening hours, and to participate in numerous work, recreation, education, social, and service programs, and including also the high quality of the administration of staff employed at the penitentiary . . . Id. at 487.

The court enjoined the defendants from double celling in the Adjustment Unit; triple celling in the Administrative Segregation Unit; triple celling in the Diagnostic Center; double celling in the Special Treatment Unit; and double celling prisoners in Housing Units 2 and 5.

The elimination of double celling in Housing Units #2 and #5 was particularly important to the over-all operation of MSP. At the time of trial in 1978, Housing Unit #2 contained at least 368 cells (each measuring 476 square feet) and housed 642 prisoners, or 27 percent of MSP's prisoner population.[3] Housing Unit #5 contained 364 cells (47 square feet) and housed 630 prisoners, or 27 percent of the relevant prisoner population. These two Housing Units housed more than 50 percent of the prisoner population. Thus, the reduction by one-half of the population in Housing Units #2 and #5 served to reduce MSP's population by at least 25 percent and, consequently, relieved the pressures caused by overcrowding and made more readily available to each remaining prisoner, opportunities for jobs, recreation, education, medical care, etc.

Plaintiffs appealed from the district court's "overcrowding" decision.[4] The Court of Appeals affirmed the District Court's decision ". . . subject to the observations, requirements and possible caveats . . . stated . . . " **Burks v. Teasdale,** 603 F.2d 59, 63 (8th Cir. 1979). The Court of Appeals noted inter alia the appropriateness of requiring defendants to submit progress reports, questioned the timetable for the conversion of Housing Units #2 and #5 to single cells and, encouraged the District Court to "keep a close watch on the situation in Housing Unit No. 3 . . . " Ibid. The Court of Appeals concluded that "whether constitutionally required or not, (we think) double-celling in (Housing Unit #3) ought to be eliminated when practicable" Ibid. In response, on remand, the District Court conferred with counsel on September 9, 1979 and inter alia

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[3]This figure is exclusive of Housing Unit No. 7 located outside the MSP walls (which housed 112 prisoners as of July 1, 1978) and Housing Unit No. 1, a/k/a, the Diagnostic Center or the receiving unit, where new prisoners remain for one - five weeks for evaluation and assignment to permanent quarters within MSP or other institutions operated by the State of Missouri.

[4]The principal issue on appeal was whether the district court erred in not prohibiting double-celling in Housing Unit No. 3, constructed in 1865, where each of the 222 cells measured 65 square feet. These cells are 1 inch narrower, 22 inches longer and 4 inches shorter than the cells in Housing Units 2 and 5 which were determined to be unfit for double-celling.

inquired whether the population reduction could be expedited and directed the Petitioners to file a progress report on their compliance with the court's previous directives. the report was filed September 27, 1979. In it the then Director of the Division of Corrections' (Mr. David Blackwell), stated the intention to convert Housing Unit #3 to "single celling after the new 500-man Eastern Missouri Medium Security Prison in St. Louis County is open". The Director's stated "intent" to single cell Housing Unit 3 reflects substantial progress over the aspiration expressed at trial in 1978 by the former Director Mr. James Walsh.[5]

(2) The Health Care Delivery System

Respondents claimed the Petitioners' health care delivery system either contained systemic deficiencies reflecting deliberate indifference on an institutional-wide basis or was so inadequate as to result in inevitable suffering.[6] Thus, as with the overcrowding issue tried earlier, Respondents' counsel was concerned with the "totality of the circumstance". The principal factual issue concerned whether there exists a demonstrable relationship between adequate medical care and proper medical records; the principal legal issue concerned the constitutional status of Petitioners' medical records and related systems.

The District Court in **Burks v. Teasdale,** supra., 492 F.Supp. at 676, concluded that:

> The medical records at MSPH are constitutionally infirm. The evidence is replete with examples of inadequate, inaccurate and unprofessionally maintained medical records. This Court rejects defendants' contention that there is an insignificant relationship between proper medical records and adequate medical care . . . Plaintiffs' experts clearly demonstrated the critical importance of adequate and accurate medical records in any attempt to provide a continuity of medical care. . . The failure over at least the past five years of prison authorities to remedy this situation demonstrates a sufficient deliberate indifference given the substantial risk that the deficiencies in the records pose to the inmates (citations omitted). The maintenance of proper medical records will serve a parallel objective of providing accurate documentation of the care received by inmates thereby insuring objective bases for review and evaluation of the level of the quality and results of the treatment provided.

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[5]At trial, on October 5, 1978, Mr. Walsh stated "it would be my hope that the administration would try to single cell the smallest possible cells, and if they double cell, it would be the larger units like Housing 4 with 104 square foot" (Trial Transcript, Vol. VI, p. 1102)(emphasis added).

[6]See, **Todaro v. Ward,** 431 F.Supp. 1129, aff'd., 565 F.2d 48 (2 Cir. 1977) and **Estelle v. Gamble** 429 U.S. 97 (1976).

> . . . The present system of record keeping is so deficient that it results in a very grave risk of unnecessary pain and suffering. Any acceptable remedy of this condition will require an analysis of all the factors relating to medical care production and maintenance - including staff training and evaluative review of staff performance.

Judge Hunter characterized the importance of medical records as "critical." **Burks v. Teasdale,** supra. 492 F.Supp. at 676. He observed then that "any acceptable remedy of this condition" would impact on staff training and evaluative review of staff performance. Ibid.

Ultimately, after a full hearing on appropriate remedies, the district court, on June 29, 1981 ordered the Petitioners, among other things, to initiate a medical records review of process which would include (1) at least one physician member who was not connected to the operation at MSPH in any manner; (2) a random selection process for medical files that will provide completely blind selection of an adequate number of files for a truly representative sample; (3) written standards or criteria for review of the files; (4) the production and maintenance of minutes of the proceedings of the review committee.

The district court also enjoined the Petitioners from the performance of surgery by non-physicians during non-emergency situations. Also, an injunction issued requiring the acquisition, and assuring the availability of, adequate life-saving equipment for those prisoners in Petitioners' Intensive Care Unit. **Burks v. Teasdale,** supra, 492 F.Supp. at 676 and 678.

The scope of the medical care issues extended beyond the walls of MSP. Respondents' evidence demonstrated that the Petitioners use of University of Missouri's Medical Center at Columbia, the Veterans Administration Hospital, the Fulton State Mental Hospital, etc., presented constitutional problems with respect to (1) the unreasonable delays prior to transfer to the referral institutions of prisoners who require the services of such institutions and (2) the premature return of the same prisoners to MSPH against physician advice. In other words, inmates experienced inordinate delays in getting to these referral institutions and, because of the lack of adequate custody personnel, in many instances have been returned to the MSPH prematurely causing a "substantial deleterious effect" on the prisoners' medical condition. Id. at 677. A new court ordered policy is now in effect which will prevent these regretful incidents.

Respondents' evidence also demonstrated that the Petitioners' use of its psychiatric unit was unconstitutional in two regards: (1) the psychiatric unit had been misused and the prisoners abused in the sense that custody personnel were accustomed to making determinations as to which prisoners would be confined to the psychiatric unit; (2) the evidence demonstrated the "complete lack of a systematic policy for the

use of seclusion and/or restraints" within the psychiatric unit. **Burks v. Teasdale,** supra, 492 F.Supp. at 679. Again a new court ordered policy is now in effect, because of this litigation, which will prevent these regretful past practices.

Thus, because of Respondents' efforts in connection with the medical issues, the court, among other things, ordered the Petitioner to initiate and maintain a medical records system at MSPH (where none existed previously), to initiate record keeping training sessions (where none existed previously), to establish a medical review committee (where none existed previously), to initiate a humane and medically sound transfer policy with respect to MSPH's referral institutions (where none existed previously), to initiate a policy on the use of its pyschiatric ward including the use of restraints (where none existed previously).

Independent of the concrete objectives achieved by way of litigation, the spector of this litigation impacted significantly on Petitioners operation even prior to the first trial in 1978 and was the catalyst for substantial change. Judge Hunter concluded ". . . be incalcuable to determine the degree of influence this litigation has had on state officials to bring about the necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years." **Burks v. Bond,** supra, A-10. Petitioners do not challenge these findings as clearly erronous.

This suit was repeatedly cited by Petitioners in the division of Corrections' Budget Requests as early as June 1976 in support of its urgent need for remedial funding. Indeed, in a Special Session of the Legislature during 1977 some $37,000,000 were appropriated for the construction and renovation of new penal institutions in Missouri. Senator Donald L. Manford, Chairman of the Senate Appropriations Committee, is reported to have had the following exchange with Warden Donald Wyrick before a meeting of the Senators' Committee:

> Q. One of the things I am concerned about, and I wanted to bring out before the Committee is the fact that there is a suit pending in federal district court now about overcrowding and it is pending in the U.S. District Court for the Western Court of the City and I have read that petition. It has not been set for hearing but I could conceive that the federal court would take that suit and start directing this Committee and the Missouri Senate and the Missouri General Assembly where to build facilities and how to build them and who they would handle and I don't know if your attorneys have looked into that fact, but I think it is a very real danger.
>
> A. It is possible, of course, the Attorney General is handling the suit and not being an attorney, I don't really know what might happen but it is a very serious suit and we are taking it that way.

By way of further example is the role played by James D. Henderson, one of Petitioners' expert witnesses in the overcrowding case. Mr. Henderson toured MSP in 1976 to

prepare his testimony. He recommended changes, which were subsequently implemented, pursuant to which, defendant inter alia initiated a new policy whereby beds were installed for all prisoners in Punitive Segregation and the cell size in the Punitive Segregation actually was increased (testimony of James Henderson, October 5, 1978, Vol. VI, p. 1154 et seq.) This situation was similar with respect to the medical issues. One of defendants' expert witnesses in the medical case, Dr. Pasquale Ciecone, testified that he also toured MSP to prepare his testimony. He said he made at least a dozen recommendations for change, each of which was implemented.

SUMMARY OF ARGUMENT

I. There is no present conflict among the Circuit Courts regarding a District Court's discretion under 42 U.S.C. 1988 to award a prevailing plaintiff reasonable attorneys' fees for professional services reasonably rendered on factual and/or legal issues relating to the successful claim without regard to whether the party prevailed also on each of the related factual and/or legal issues.

II. This Court and the Courts of Appeals have consistently held that District Courts have discretionary authority to award costs and expenses not specifically allowed by statute. The Court of Appeals below held the District Court properly exercised that discretion and there is no need for further review by this Court.

ARGUMENT

I. The Court Below Properly Determined that the Respondents Substantially Prevailed And Were Entitled Therefore to a Reasonable Attorney's Fees for All Work Performed on Legal and Factual Issues Relating to Their Successful Claims.

Petitioners urged the District Court to award fees in accordance with the wooden rule whereby ". . . an attorney is only entitled to the award of fees for the time devoted to those issues on which he has been successful." (Defendants' Suggestions in Opposition to Plaintiffs' Request for Attorneys' Fees, filed on or about July 11, 1980, p. 29). The District Court rejected the petitioners' position and used a more elastic measure, saying:

> . . . This Court declines to adopt defendants' proportionate success formula. [citations omitted]
>
> In a case of this magnitude, involving the conditions in an important state institution, this Court refuses to attempt to artificially segregate the issues in this litigation and make isolated assignments of success. It is the opinion of this Court that the entire record in this case compiled over a seven year period clearly reflects a monumental effort on the part of plaintiffs and a substantial degree of success in improving the conditions at MSP. The impact of the orders affecting over-crowding and medical treatment have had wide-ranging effects on the institution as a whole. Further, it would be incalculable to determine the degree of influence this litigation has had on state officials to bring about necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years. Therefore, this Court considers plaintiffs to have prevailed for purposes of 42 U.S.C. 1988. **Burks, et al. v. Bond, et al.** (Civil Action Nos. 77-4008-CV-C; 75-100-CV-C; 78-4093-CV-C, W.D. Mo., July 20, 1981) (attached to Petition For a Writ of Certiorari, Appendix B, pp. A-9-10).

Petitioners argue in this Court that Respondents' claims regarding overcrowding and sanitary conditions involved separate factual and legal issues which the District Court should have segregated for purposes of determining counsel's compensation. Petitioners argue similarly with respect to Respondents' claims that the Petitioners' health care delivery system was operated in an unconstitutional manner.

Contrary to the defendants' arguments, and as evidenced by the reported decisions in this case, the matters characterized by Petitioners as multiple claims were really subsidiary factual or legal issues relating to one of Respondents' two principle claims: (1) the Missouri State Penitentiary was so overcrowded as to violate constitutional imperatives, **Burks v. Walsh**, 461 F.Supp. 454, 456 (W.D. Mo. 1978), aff'd. sub nom **Burks v. Teasdale**, 603 F.2d 59 (8th Cir. 1979), and (2) the health care delivery system at the MSP either contained systemic deficiencies reflecting deliberate indifference on an institution-wide basis or was so inadequate as to result in inevitable suffering, **Burks v. Teasdale**, 492 F.Supp. 650, 675 (W.D. Mo. 1980). In both instances,

Respondents' claims were institutional in nature and subject to the nuances of many subsidiary factual and legal issues.

Respondents prevailed below on both claims in significant ways. As noted by the District Court, "The magnitude of this seven year old litigation cannot be overstated." **Burks v. Bond, supra,** Petitioners' Appendix B, pp. A-3. The District Court properly concluded that this prison case defies compartmentalization. The District Court also observed that any attempt to segregate the issues to make isolated assignments of success would be artificial. **Burks v. Bond, supra,** Petitioners' Appendix B, p. A-9. The cases and counsels' efforts must be viewed in their entirety. If plaintiffs prevailed in any significant manner:

> . . . Plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.[7]

Thus, absent circumstances which would make such an award unjust,[8] a District Court may properly award fees to a prevailing plaintiff's counsel for time expended on subsidiary legal and factual issues in those instances, among others, where they are determined to be related to the claim(s) on which he prevails.

Petitioners concede that the District Court's analysis and conclusions are consistent with the case law as set forth in **Jones v. Diamond,** 636 F.2d 1364 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982), **Gurule v. Wilson,** 635 F.2d 782 (10th Cir. 1980), **Siegal v. Merrick,** 619 F.2d 160 (2nd Cir. 1980), **Northcross v. Board of Education,** 611 F.2d 624 (6th Cir. 1979), and **Lamphere v. Brown University,** 610 F.2d 46 (1st Cir. 1979).

Petitioners mistakenly rely on **Copeland v. Marshall,** 641 F.2d 880 (D.C. Cir. 1980), **Nadeau v. Helgemoe,** 581 F.2d 275 (1st Cir. 1978), **Hughes v. Repko,** 578 F.2d 491 (3rd Cir. 1978), **Muscare v. Quinn,** 614 F.2d 577 (7th Cir. 1980), **Schaeffer v. San Diego Yellow Cabs, Inc.,** 642 F.2d 1002 (9th Cir. 1972) and **Bethy v. Alameda County**

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[7]**Brown v. Bathke,** 558 F.2d 634, 637 (8th Cir. 1978) quoting **Davis v. County of Los Angeles,** 8 E.P.D. ¶9444 (C.D. Cal. 1974), quoted with approval in S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), p. 5.

[8]Counsel's pursuit of "manufactured" and "clearly frivolous" issues would not be compensable as time reasonably expended. **Brown v. Bathke, supra,** 588 F.2d at 637. Petitioners have not argued these characteristics are appropriately used with respect to any issue or claim in this litigation.

Water District, 602 F.2d 894 (9th Cir. 1979)[9] to generate a supposed conflict among the Circuit Courts regarding the propositions set out in **Brown v. Bathke, supra.** An examination of Petitioners' cases shows that there is no true conflict between any of the circuits and the prevailing law in the Eighth Circuit as applied to this case.

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) as cited by the Petitioners speaks directly to the situation where plaintiffs prevailed on less than all of several separable claims and only indirectly to the question of success or failure on subsidiary factual or legal issues relating to the successful claims. However, the court in **Copeland, supra,** observed, in terms applicable to this case, that:

> No reduction in fee is appropriate where the "issue was all part and parcel of one matter," **Lamphere v. Brown University**, 610 F.2d 46, 47 (1st Cir. 1979), but only where the claims asserted "are truly fractionable." Id. **Copeland v. Marshall, supra,** 641 F.2d at 892, n. 18.

The same proposition is contained in **Muscare v. Quinn**, 614 F.2d 577 (7th Cir. 1980), **Nadeau v. Helgemoe**, 581 F.2d 275 (1st Cir. 1978) and **Hughes v. Repco**, 578 F.2d 483 (3rd Cir. 1978) relied upon by the Petitioners. The Court of Appeals in **Hughes v. Repco, supra,** 578 F.2d at 487, stated the proposition in the following language:

> . . . A prevailing party on a particular claim is one who fairly can be found by the District Court to have essentially succeeded on such claim, as "claim" is used in Fed. R. Civ. P. 10(b). We say, "essentially succeeded" because in many cases a party may prevail on his basic claim but not on all aspects thereof. Given the spirit and purposes of the statute, we think our test allows the District Courts to meet their obligation under the Act. Thus, we believe that plaintiffs here essentially prevailed on their §1982 claim against Mrs. Repco, even though they were denied punitive damages and even though their request that the attorney's fee question be decided by the jury was rejected. The application "essentially successful" standard normally is left, of course, to a sound exercise of the discretion by the District Court in the first instance.

Fees were reduced in **Hughes v. Repco, supra,** because the plaintiffs were unsuccessful in claims other than the 42 U.S.C. §1982 claim referenced above. See also **Nadeau v. Helgemoe, supra,** 581 F.2d at 279. Similarly, in **Muscare v. Quinn**, 614 F.2d 577 (7th Cir. 1980), the plaintiff asserted two independent claims and prevailed on one of them. **Muscare, supra,** 614 F.2d at 580. The Court of Appeals for the Seventh Circuit has since indicated its willingness to compensate a prevailing party for reasonable efforts undertaken in connection with a subsidiary factual or legal issue related to a successful

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[9]Petitioners' reliance on these two Ninth Circuit Court of Appeals decisions is, at best, tenuous in light of subsequent decisions from that Circuit indicating adherence to the propositions basic to **Brown v. Bathke, supra.** See, **Gluck v. American Protection Industries, Inc.**, 619 F.2d 30, 33 (9th Cir. 1980) and **Seattle School District No. 1 v. Washington**, 633 F.2d 1338, 1349-1350 (9th Cir. 1980).

claim. **Syvock v. Milwaukee Boiler Manufacturing Company, Inc.**, 665 F.2d 149, 162-165 (1981).

II. The Court Below Acted Properly and in a Manner Consistent With Decisions of this Court and Other Courts of Appeals in Awarding Certain Costs and Expenses Not Specifically Allowed by Statute.

Petitioners contend that courts have no authority or discretion to award costs and expenses not specifically allowed by statute. This Court addressed that issue in **Farmer v. Arabian American Oil Co.**, 379 U.S. 227 (1964), and upheld the power of courts to award such costs under Rule 54(d), F.R.Civ.P. Cautioning that the discretion should be exercised with restraint, the Court stated: "Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. at 235.[10]

The District Court below exercised its discretion in taxing costs and expenses against Petitioners, allowing some items and denying others. The District Court's action was carefully reviewed by the Eighth Circuit Court of Appeals and no abuse of discretion was found. There is no need for further review by this Court.[11]

This Court need not involve itself in defining further the standards to be applied by the District Courts in the exercise of their discretion. The Circuit Courts generally are applying the same standards in their decisions.

In civil rights cases, the Courts of Appeals that have ruled on these issues are all in agreement with the Eighth Circuit's decision below that litigation expenses, including expert witness fees, may be awarded in appropriate circumstances.[12]

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[10]**Henkel v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.**, 284 U.S. 444 (1932), relied on by Petitioners, was not a case where the Court was called upon to construe the prevailing federal costs statutes, but required the Court only to determine whether federal or state law governed the award of costs. While **Henkel** pre-dated the Federal Rules of Civil Procedure, the Court noted that it had held previously that courts do have discretion to award the fees of a court-appointed expert, even though such fees are outside of the court's statutory authority. 284 U.S. at 244.

[11]That the Circuit Courts are fully capable of monitoring the District Court's discretion in this area is evidenced by the historic lack of intervention by this Court. As far as Respondents are aware, since **Henkel, supra**, was decided in 1932, this Court's only decision involving litigation costs was its 1964 decision in **Farmer, supra.**

[12]**Jones v. Diamond**, 636 F.2d 1364, 1382 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982); **Northcross v. Board of Education**, 611 F.2d 624, 639-40 (6th Cir. 1979); **EEOC v. Kenosha Unified School District No. 1**, 620 F.2d 1220, 1227-28 (7th Cir. 1980); **Thornberry v. Delta Air Lines, Inc.**, 676 F.2d 1240, 1244-45 (9th Cir. 1982). The Fourth Circuit is in agreement with the above cases that litigation expenses related to the attorneys' work are compensable, but has made no holding with respect to expert witness fees. **Wheeler v. Durham City Board of Education**, 585 F.2d 618, 623-24 (4th Cir. 1978). See also **Pennsylvania v. O'Neill**, 431 F.Supp. 700, 713-15 (E.D. Pa. 1977), affirmed without opinion, 573 F.2d 1301 (3rd Cir. 1978).

The legislative history of the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988, provides strong support for District Court's and Court of Appeals' decisions below. The Congressional committee reports recommending passage of the Act repeatedly assert the intent of Congress to make it possible for the most impecunious citizens to vindicate their important civil rights.[13] In comments made in debate on the Act in the House of Representatives, a key sponsor, Representative Drinan addressed more directly the question whether out-of-pocket expenses and expert witness fees may be awarded under the Act:

> I should add that the phrase "attorney's fee" would include the values of legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 C.R. H12160 Daily Ed. (1 Oct. 1976)

The **Senate Committee Report**, 94-1011, 94 Cong. 2d Sess. (1976), discusses the appropriate standards to be applied in awarding attorney's fees under the Act. It indicates that the standards should be generally the same as those under the fee provisions of the Civil Rights Act of 1964. It points to three District Court cases in which the standards have been correctly applied. In one of these, **Davis v. County of Los Angeles**, 8 E.P.D. §9444 (C.D. Cal. 1974), plaintiffs' counsel had submitted a bill for expert witness fees in its attorney's fee request. The court calls these charges "valid" and includes the amount requested in the fee award. Id. at p. 5048.

Even in cases not involving civil rights statutes the lower courts are in general agreement that the taxation of costs for non-statutory expenses, including expert witness fees, is within the discretion of the District Court. See, **Roberts v. S.S. Kyriakoula D. Lemos**, 651 F.2d 201 (3rd Cir. 1981), and cases cited therein. The cases cited by

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[13]**The House Committee Report**, 94-1558, 94th Cong., 2d Sess. (1976) identifies the purpose and application of the Act:

> In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law. p. 1.

The same purpose is reiterated in the **Senate Committee Report**, infra:

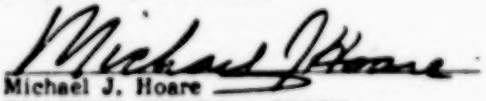
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. p. 2.

Petitioners create no conflict with that position sufficient to warrant intervention by this Court.[14]

CONCLUSION

The Court of Appeals properly affirmed the District Court's exercise of discretion in awarding the prevailing party reasonable attorneys' fees, costs and expenses. As this Court already has held that District Courts have discretion to award costs and expenses beyond those allowed by statute, and there is no conflict in the Circuits on the issue, the petition for certiorari should be denied as to that question. Because there is no present conflict among the circuits on the law applicable to the attorneys' fees question raised by this case, the petition for certiorari should be denied on that issue as well.

Respectfully submitted,



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[14] While Baum v. United States, 432 F.2d 85 (5th Cir. 1970) denied expert witness fees, it stated the issue is "discretionary with the courts under Rule 54(d)." 432 F.2d at 86. In Wehr v. Burroughs Corp., 477 F.Supp. 1012, 1022 (E.D. Pa. 1979), affirmed, 619 F.2d 276 (3rd Cir. 1980), the District Court recognized the rule allowing taxation of expert witness fees, but did not apply it because the expert did not testify at trial. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 223-24 (9th Cir. 1964), denied "accounting fees," not "expert witness fees" as petitioners contend; and in any event, predated Farmer v. Arabian American Oil Co., supra. Wahl v. Carrier Manufacturing Co., 511 F.2d 209, 217 expressly recognized the District Court's discretion under Farmer to tax costs not specifically allowed by statute. In Kinsey v. Legg Mason Wood Walker, 23 F.E.P. Cases 774, 777 (D.D.C. 1978), affirmed without opinion, 585 F.2d 572 (D.C. Cir. 1978), the District Court exercised its discretion in disallowing non-statutory costs. City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (1st Cir. 1971), recognized Farmer, and while it denied certain cost items, it upheld others as "within the court's discretion."

NO. 82-747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHRISTOPHER BOND, LAWRENCE GRAHAM, GEORGE CAMP, EDWARD HAYNES, and DONALD WYRICK,
Petitioners,

v.

CALVIN BURKS, JAMES X. HALL, ROOSEVELT MARTIN, WILLIE NORWOOD, DOUGLAS W. THOMPSON, JAMES E. WILLIAMS and DARRYL HINES, and all other prisoners similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondents, pursuant to Supreme Court Rule 46, and by their counsel, respectfully request leave to proceed herein in forma pauperis.

Leave to proceed on appeal in forma pauperis was sought by respondents in the District Court for the Western District of Missouri, in a motion filed on or about December 5, 1978. Leave was granted by said court on December 12, 1978.

Because this matter has been certified as a class action involving the prisoners at the Missouri State Penitentiary and in view of the difficulties attendant to securing affidavits from all members of the subject class, as they did in the district court, respondents also seek leave to rely on the attached affidavit of counsel in lieu of affidavits from members of the subject class.

The grounds for this motion are set forth in the attached affidavit of counsel.

Respectfully submitted,

CHACKES, HOARE & SEDEY

Michael J. Hoare

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NO. 82-747

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF COUNSEL IN SUPPORT OF RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Michael J. Hoare, counsel for the respondents in the above captioned case, deposes and says as follows in support of respondents' Motion for Leave to Proceed In Forma Pauperis:

1. I am counsel for the respondents herein and was counsel for plaintiffs/appellees below.

2. On September 18, 1978, the district court entered an order certifying this case as a class action. By a previous order, the district court consolidated **Burks v. Walsh**, 77-4008-CV-C with two other actions, **Thompson v. Teasdale**, 75-CV-100-C and **Hines v. Teasdale**, 78-4093-CV-C, wherein inmates had been proceeding pro se.

3. Since March 1978, when I entered by appearance, I have corresponded and conferred personally with numerous members of plaintiffs' class in **Burks v. Walsh** who are incarcerated at the Missouri State Penitentiary (MSP). In addition, I have personally met and conferred with Mr. Douglas Thompson (**Thompson v. Teasdale**) and Mr. Darryl Hines (**Hines v. Teasdale**).

4. On information and belief, I know of no member of plaintiffs' class in **Burks v. Walsh** who is able to pay the costs of these proceedings or to give security

5. On information and belief, I believe the practice and policy of the defendant Department of Correction prohibits inmates from collecting, gathering, soliciting or amassing funds from each other or others for any reason.

6. On information and belief, I believe that many of the above referenced inmates are employed presently, as are other inmates at MSP, but receive meager wages. In most instances these wages are needed to purchase the basic necessities of life, and little remains for other purposes.

7. I have no knowledge of any inmate's income from any business, profession, bank account, real estate, securities or other properties, real or personal.

8. None of the Respondents' atorneys has received any remuneration for any services rendered in this litigation to date.

Michael J. Hoare
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Attorneys for Respondents
314 North Broadway
St. Louis, Missouri 63102
314/241-7961

Subscribed and sworn to before me this 15 day of December, 1982.

Notary Public

My Commission Expires:

KENNETH M. CHACKES
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS CO.
MY COMMISSION EXPIRES SEPT. 28 1984

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to Rule 28.5, Rules of the Supreme Court, he has served a copy of the foregoing motion and affidavit upon all parties required to be served by depositing same in a United States mailbox, first class postage prepaid, addressed to John Ashcroft, Attorney General and Michael Boicourt, Assistant Attorney General, Broadway State Office Building, P.O. Box 899, Jefferson City Missouri, 65102-0899, this 15 day of December, 1982.